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Fifth report on reservations to treaties

By Mr. Alain Pellet, Special Rapporteur

Addendum

Part Two
Procedure regarding reservations and interpretative declarations

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Part Two
Procedure regarding reservations and interpretative declarations

Introduction

214. In his second report, the Special Rapporteur proposed a "provisional general outline of the study" on reservations,[357] which the Commission endorsed.[358] According to this outline, the first two parts of the study on reservations to treaties would deal with, respectively, the unity or diversity of the legal regime for reservations to multilateral treaties (reservations to human rights treaties) and the definition of reservations. The first of these topics was addressed in chapter II of the second report[359] and the second was addressed in the third report,[360] a small part of the fourth report[361] and chapter II of the fifth report.[362]

215. Also according to the general outline, the third part of the study was to deal with the formulation and withdrawal of reservations, acceptances of reservations and objections to reservations. The overall format of this part was presented as follows in the second report:

> "III. FORMULATION AND WITHDRAWAL OF RESERVATIONS, ACCEPTANCES AND OBJECTIONS
>
> A. Formulation and withdrawal of reservations
>
> (a) Acceptable times for the formulation of a reservation (1969 and 1986, art. 19, *chapeau*);
>
> (b) Procedure regarding formulation of a reservation (1969 and 1986, art. 23.1 and 4);
>
> (c) Withdrawal (1969 and 1986, art. 22.1 and 3 (a) and 23.4).
>
> B. Formulation of acceptances of reservations
>
> (a) Procedure regarding formulation of an acceptance (1969 and 1986, art. 23.1 and 3);
>
> (b) Implicit acceptance (1969 and 1986, art. 20.1 and 5);
>
> (c) Obligations and express acceptance (1969 and 1986, art. 20.1, 2, and 3) (124 (ii), 148 (xii)).

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[357] A/CN.4/477, para. 37.

[358] See *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), para. 114, and ibid., *Fifty-second Session, Supplement No. 10* (A/52/10), paras. 116 et seq.

[359] A/CN.4/477 and Corr.1 and Add.1 and Corr.1 to 4.

[360] A/CN.4/491/Add.1 to 6 and A/CN.4/491/Add.2/Corr.1, Add.3/Corr.1, Add.4/Corr.1 and Add.6/Corr.1.

[361] A/CN.4/499, paras. 44 to 54.

[362] A/CN.4/508/Add.1. All the draft guidelines dealing with the definition of reservations are contained in an annex to this document.

C. Formulation and withdrawal of objections to reservations

(a) Procedure regarding formulation of an objection (1969 and 1986, art. 23.1 and 3);

(b) Withdrawal of an objection (1969 and 1986, art. 22.2 and 3 (b) and 23.4)."[363]

216. Overall, this format still seems valid and the Special Rapporteur proposes to follow it in the present part of the fifth report.

217. Nevertheless, he has seen fit to make some adjustments in the light, essentially, of the inclusion in part I of the Guide to Practice of a number of definitions dealing with interpretative declarations.[364]

218. Although he had hoped to be able to begin dealing comprehensively with the "legal regime of interpretative declarations" in his third report,[365] the Special Rapporteur found, when he came to write that report, that this was neither feasible nor desirable:[366] the legal regime of interpretative declarations cannot be studied independently of the related element of reservations.[367] This is particularly true of conditional interpretative declarations, the legal regime of which undoubtedly is (or should be) very close to that of reservations.[368]

219. Like the other parts of the study, this part will therefore deal both with the procedure regarding reservations (and acceptances and objections related thereto) and with the formulation and withdrawal of interpretative declarations (straightforward or conditional) and reactions to such declarations.

220. Once again, the Special Rapporteur wishes to explain that he intends to adhere strictly to the approach proposed in the 1996 provisional general outline and to deal in this part of the study only with the *procedural* issue of the *formulation* of the various kinds of interpretative declaration, and not with the issue of whether or not they are lawful, which he will take up in his next report. However, this does not mean that there is no link whatsoever between the two issues: the respect for form

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[363] A/CN.4/477, para. 37. The references in parentheses are to the relevant articles of the Vienna Conventions of 1969 and 1986. Moreover, a footnote stated that: "To the extent that the role of depositories seems, in the predominant system, to have been exclusively 'mechanical', this chapter will probably be the logical — although probably not exclusive — place to discuss that topic".

[364] Cf. draft guidelines 1.2, 1.2.1 and 1.2.2.

[365] Cf. "Provisional general outline of the study", A/CN.4/477, para. 37.

[366] See, for instance, *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), para. 15, or ibid., *Fifty-third Session, Supplement No. 10* (A/53/10), paras. 534 and 539. See also the following summary records of the International Law Commission: 3 June 1997, A/CN.4/SR.2987, paras. 15 (Mr. Pellet) and 28 (Mr. Pambou-Tchivounda); 26 June 1997, A/CN.4/SR.2500, para. 35 (Mr. Addo); 30 July 1998, A/CN.4/SR.2552, p. 5 (Mr. Lukashuk and Mr. Pambou-Tchivounda), pp. 7 and 16 (Mr. Pellet), pp. 9 to 10 (Mr. Hafner), p. 10 (Mr. Brownlie) and p. 11 (Mr. Simma).

[367] In a recent study, Rosario Sapienza accepts that the legal regime of reservations must be a starting point for studying the legal regime of interpretative declarations, but argues that the latter regime is a separate issue. *Dichiarazioni interpretativi unilaterali e trattati internazionali*, Milan, Giuffrè, 1996, p. 222. See likewise Frank Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, T.M.C. Asser Instituut, Swedish Institute of International Law, Studies in International Law, vol. 5, 1988, pp. 243 to 244.

[368] Cf. Third report on reservations to treaties, A/CN.4/491/Add.4, para. 334.

considered in this part is an element of the lawfulness of reservations and determines their legal effects, as the wording of the opening phrase of paragraph 1 of article 21 of the Vienna Conventions of 1969 and 1986 clearly shows:[369] "A reservation established with regard to another party *in accordance with articles 19, 20 and 23* ..." produces the effects indicated in the subparagraphs of paragraph 1 that follow.

221. Moreover, as in the case of definitions and in accordance with the decision taken by the Commission in 1996,[370] one should start systematically with the relevant provisions of the Vienna Conventions of 1969 and 1986 whenever those Conventions, no matter how incomplete, contain rules on some of the procedural problems dealt with in this part. This is obviously true of article 23 of the Conventions, entitled "Procedure regarding reservations", but other provisions of the Vienna Conventions contain rules on the formulation of reservations, their acceptance or objections thereto. These provisions are listed in the excerpt from the provisional general outline reproduced above;[371] they are the *chapeau* to article 19, part of article 20 and article 22. As a result, as was done for the definition of reservations,[372] the Special Rapporteur will propose reproducing these provisions in the Guide to Practice, adapting them where necessary to the Guide's form and layout.

222. By virtue of the above, the present part will be organized as follows:

- Chapter III: Formulation, modification and withdrawal of reservations and interpretative declarations;
- Chapter IV: Formulation and withdrawal of acceptances of and objections to reservations and of reactions to interpretative declarations ("reservations dialogue").

III. Formulation, modification and withdrawal of reservations and interpretative declarations

223. According to José María Ruda, "[t]he procedure regarding reservations should necessarily be analogous to the procedure for the conclusion of treaties, because a reservation modifies the application of the provisions of a treaty, i.e., it modifies the substance of a contractual stipulation".[373] This is true in part, but disregards the fact that reservations are, by definition, *unilateral* declarations, an essential characteristic that makes them very different from the treaty to which they relate and which explains the procedural particularities of their formulation.

224. As one writer has said, "[l]'apposizione di riserve ad un trattato è regolata da *norme diplomatici-processuali*, che concernono il *momento* in cui la riserva può essere posta; la *forma* che essa deve assumere; la *pubblicità*, onde fa d'uopo che sia

[369] See likewise Sir Robert Jennings and Sir Arthur Watts, *Oppenheim's International Law, Ninth Edition*, vol. I, *Peace*, parts 2 to 4, London, Longman, 1992, p. 1247.

[370] *Official Records of the General Assembly, Fiftieth Session, Supplement No. 10* (A/50/10), para. 491 (d).

[371] Para. 215.

[372] Cf. draft guideline 1.1.

[373] "Reservations to Treaties", *R.C.A.D.I.* 1975-III, vol. 146, p. 193.

circondata; e, infine, la *revocabilità*, che è propria della riserva stessa"[374] (the formulation of reservations to a treaty is regulated by *diplomatic-procedural* norms, which concern the *moment* at which the reservation can be made; the *form* which it must take; the *publicity* which must be given to it; and, lastly, the *revocability* which is its defining feature). However, this ignores the fact that the withdrawal of reservations, a consequence of their "revocability", is subject to special rules which are not entirely symmetrical with those applicable to their formulation, since the modification of reservations can be a means of partially withdrawing them, something which remains highly problematic and should therefore be studied at the same time as withdrawal *stricto sensu*.

225. While the procedure for the formulation and withdrawal of reservations is fairly precisely regulated in the Vienna Conventions, the Conventions make no mention of the rules applicable to interpretative declarations, which one can but try to "develop progressively" by comparison with those on the formulation and withdrawal of reservations, in the light of a somewhat vague practice, since it does not seem possible to develop them entirely separately.

226. This chapter will therefore be divided into two sections on, respectively: (a) the formulation of reservations and interpretative declarations and (b) their withdrawal and modification.

A. Formulation of reservations and interpretative declarations

227. While the three Vienna Conventions of 1969, 1978 and 1986 define reservations as being "made" at specific moments,[375] it is the verb "formulate" that is used in the substantive provisions on reservations:

- "A State may, when signing, ratifying, accepting, approving or acceding to a treaty, *formulate* a reservation unless ..." (article 19 of the Vienna Convention of 1969,[376] "Formulation of reservations");
- "The reservation [must] be *formulated* ... in writing ..." (article 23, paragraph 1, of the 1969 and 1986 Conventions, "Procedure regarding reservations");
- "If *formulated* when signing the treaty subject to ratification, acceptance or approval, a reservation must be formally confirmed ..." (article 23, paragraph 2, of the 1969 Convention[377]);
- "When a newly independent State establishes its status as a party or as a contracting State to a multilateral treaty ... it shall be considered as maintaining any reservation to that treaty which was applicable at the date of the succession of States ... unless, when making the notification of succession, it expresses a contrary intention or *formulates* a reservation which relates to

[374] Adolfo Maresca, *Il diritto dei trattati — La Convenzione codificatrice di Vienna del 23 Maggio 1969*, Milan, Giuffrè, 1971, p. 299; the italics are his.

[375] Cf. articles 2 (d) of the 1969 and 1986 Conventions and 2 (j) of the 1978 Convention.

[376] Article 19 of the 1986 Convention is identical, except that it also gives international organizations the power to formulate reservations.

[377] Article 23, paragraph 2, of the 1986 Convention is identical, except that it adds act of formal confirmation to the list of ways of expressing consent to be bound by a treaty.

the same subject-matter as that reservation" (article 20, paragraph 1, of the Vienna Convention of 1978 on Succession of States in respect of Treaties);

– "When making a notification of succession establishing its status as a party or as a contracting State to a multilateral treaty ... a newly independent State may *formulate* a reservation unless the reservation is one the *formulation* of which would be excluded ..." (article 20, paragraph 2, of the 1978 Convention);

– "When a newly independent State *formulates* a reservation ..." (article 20, paragraph 3, of the 1978 Convention).

228. The use of the verb *formulate* rather than *make* in the above provisions is the result of a deliberate choice:[378] the authors of the Conventions wanted to make it clear that a reservation is not sufficient in itself and produces effects (hence is "made") only if it is either accepted[379] or expressly authorized by the treaty.[380] This choice does not, of course, solve every problem,[381] and the Commission will have to come back to it when it takes up the question of the legal effects of reservations; it nevertheless shows, quite rightly, that the formulation of a reservation is part of a *process* of which it is the starting point and which continues (in theory) with its acceptance (or rejection — by means of an objection), which are dealt with in the next chapter of this report.

229. For now, all that matters is this starting point, namely, the moment at which a reservation (or an interpretative declaration) is formulated, the form it takes and the publicity which must be given to it. The hidden part of the iceberg, i.e. the internal procedure leading to the formulation of the reservation or interpretative declaration, must also be examined, as must its international implications.

1. Moment of formulation of reservations and interpretative declarations

230. Although the moment at which a reservation or a conditional interpretative declaration may be formulated is mentioned in their definitions,[382] it is necessary to come back to it: first of all, simply listing the "cases in which a reservation may be formulated", to use the title chosen by the Commission for draft guideline 1.1.2, does not solve all the problems raised in this regard; secondly, the Vienna Conventions themselves address the issue in several places.

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[378] Cf. with regard to future article 19 of the 1969 Convention, the first and fourth reports of Sir Gerald Fitzmaurice on the law of treaties (*Yearbook ... 1962*, vol. II, p. 62, para. 1, and p. 65, para. 9, and *Yearbook ... 1965*, vol. II, p. 53, para. 6) and the rejection of the proposal by China at the Vienna Conference that the words "formulate a reservation" should be replaced by "make reservations" (*Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Documents of the Conference* (United Nations publication, Sales No. E.70/V.5), paras. 176 and 183).

[379] Cf. article 20 of the Vienna Conventions of 1969 and 1986.

[380] Which is why article 19, paragraph 2 (b), refers to "specified reservations" which "may be made".

[381] See the developments recorded by P. H. Imbert in "L'ambiguité de l'expression 'formulation des réserves'" (*Les réserves aux traités multilatéraux*, Paris, Pédone, 1979, pp. 83 to 86; see also pp. 89 to 90 and J. M. Ruda, "Reservations to Treaties", *R.C.A.D.I.*, 1975-III, vol. 146, p. 179). Moreover, it is hard to see why article 2, paragraph 1 (d), uses the word "made" in the definition of reservations.

[382] Cf. draft guidelines 1.1, 1.1.2, 1.1.4 and 1.2.1.

231. The limit on the time within which a unilateral declaration may be formulated in order to constitute a reservation under article 2, paragraph 1 (d), is in fact confirmed by articles 19 and 23, paragraph 2, of the 1969 Convention and the corresponding provisions of the 1986 Convention:[383]

Article 19. Formulation of reservations

"A State or an international organization may, when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, formulate a reservation unless ...".

Article 23. Procedure regarding reservations

"2. If formulated when signing the treaty subject to ratification, act of formal confirmation, acceptance or approval, a reservation must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation".

232. Moreover, article 20 of the Vienna Convention of 1978 accepts that a reservation may be maintained or formulated at the moment when "a newly independent State establishes its status as a party or as a contracting State to a multilateral treaty by a notification of succession".

233. There is no point in returning to the issues already addressed and resolved by the Commission in connection with the definition of reservations. It can be taken as settled that:

- The list in article 19 of the 1969 and 1986 Conventions includes "all the means of expressing consent to be bound by a treaty referred to" in the two Conventions;[384]
- A reservation may be formulated in relation to a territory in respect of which it makes a notification of territorial application;[385]
- The omission from the list in article 19 of the possibility of formulating a reservation on the occasion of a succession of States was remedied, at least in part, by article 20 of the Vienna Convention of 1978;[386] and
- It is not useful to state expressly that a treaty may provide for the possibility of formulating a reservation at any other moment, since all the guidelines in the

[383] It is the latter provisions which are reproduced here, since they include act of formal confirmation among the means of expressing consent to be bound, which the Vienna Convention of 1969, dealing exclusively with treaties among States, omits.

[384] See draft guideline 1.1.2 and its commentary (*Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), pp. 203 to 206); see also the third report on reservations to treaties, A/CN.4/491/Add.3, paras. 138 to 143.

[385] See draft guideline 1.1.4 and its commentary (*Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), pp. 209 to 210); see also the third report on reservations to treaties, A/CN.4/491/Add.3, paras. 144 to 146.

[386] See draft guideline 1.1 and paragraphs 5 and 8 of its commentary (*Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), pp. 196 to 198); see also the third report on reservations to treaties, A/CN.4/491/Add.1, paras. 70 to 72, and Add.3, para. 138. The specific problems with regard to succession of States will be dealt with in a separate study and in a specific part of the Guide to Practice.

Guide to Practice are intended to substitute for an absence of will and the contracting parties to a treaty can always derogate therefrom if they see fit.[387]

234. On this latter point, it could nevertheless be asked whether it would be advisable to indicate in the Guide to Practice that such a possibility must be expressly provided for in the treaty or unanimously accepted by the parties. This goes back to the more general problem of reservations which are formulated late (see paras. 279 to 306). Moreover, a number of points should be made regarding the formulation *ratione temporis* of reservations and interpretative declarations (see paras. 235 to 278).

[387] See, for instance, the second report on reservations to treaties, A/CN.4/477/Add.1, paras. 133 and 163, and the third report, A/CN.4/491/Add.2, paras. 102 to 103, and Add.3, paras. 138 to 140; see also *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), para. 122, and para. 5 of the commentary on draft guideline 1.1.2 (ibid., *Fifty-third Session, Supplement No. 10* (A/53/10), p. 205).

(a) Reservations and interpretative declarations formulated *ratione temporis*

The travaux préparatoires of article 19 and article 23, paragraph 2, of the Vienna Conventions of 1969 and 1986

235. The text of article 23, paragraph 2, of the Vienna Convention of 1986,[388] which requires the confirmation of reservations made when signing if they have been formulated "subject to ratification, act of formal confirmation, acceptance or approval", is reprinted above (para. 231).

236. This provision originated in the proposal, made by Sir Humphrey Waldock in his first report, to include a provision (draft article 17, paragraph 3 (b)) based on the principle that "the reservation will be presumed to have lapsed unless some indication is given in the instrument of ratification that it is maintained".[389] The Special Rapporteur did not conceal that "[c]learly, different opinions may be held as to what exactly is the existing rule on the point, if indeed any rule exists at all",[390] mentioning, in particular, article 14 (d)[391] of the Harvard draft, which posited the contrary assumption.[392]

237. The members of the Commission, absorbed in the discussion of the provisions concerning the lawfulness of reservations, attached hardly any importance to this part of the draft of what was then article 17 during the discussion in plenary meeting.[393] After considering it on two successive occasions, the Drafting Committee adopted the principle proposed by the Special Rapporteur, while making several changes (not all of them felicitous[394]) to the initial draft.[395]

238. The commentary on this provision (which became article 18, paragraph 2) is interesting in that it explains in a concise way the *raison d'être* of the rule adopted by the Commission:

> "A statement of reservation is sometimes made during the negotiation and duly recorded in the *procès-verbaux*. Such embryo reservations have sometimes been relied upon afterwards as amounting to formal reservations. It seems essential, however, that the State concerned should formally reiterate the statement in some manner in order that its intention actually to formulate a reservation should be clear."[396]

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[388] The text of the same provision in the 1969 Convention is identical, the only difference being that it does not mention the procedure to be followed by an international organization.

[389] *Yearbook ... 1962*, vol. II, p. 66.

[390] Ibid.

[391] Waldock was citing article 15 (d) by error.

[392] "If a State has made a reservation when signing a treaty its later ratification will give effect to the reservation in the relations of that State with other States which have become or may become parties to the treaty"; the Harvard draft is reprinted in *Yearbook ... 1950*, vol. II, pp. 243-244.

[393] Cf. the summary records of the 651st to 656th meetings (25 May-4 June 1962), *Yearbook ... 1962*, vol. I, pp. 139-179. See, however, the comments by Mr. Castrén (652nd meeting, 28 May 1962, p. 148) and Sir Humphrey Waldock (656th meeting, 4 June 1962, pp. 174-175).

[394] The Drafting Committee referred, in particular, to confirmation of the reservation by the State which formulates it "when carrying out the act establishing its own consent to be bound by the treaty" (*Yearbook ... 1962*, vol. I, p. 221).

[395] See the summary records of the 663rd and 668th meetings (18 and 25 June 1962), *Yearbook ... 1962*, vol. I, pp. 221-223 and p. 257.

[396] *Yearbook ... 1962*, vol. II, p. 180.

239. Governments made hardly any comments on the substance of draft article 18. Nevertheless (leaving aside the observations of Denmark and Finland, which concerned minor drafting questions[397]), note can be taken of Sweden's comment that articles 18 and 19, which dealt with acceptance of and objections to reservations, contained much that "simply exemplifies what the parties may prescribe or that merely amounts to procedural rules which would fit better into a code of recommended practices".[398] Further to these observations, the Special Rapporteur, Sir Humphrey Waldock, proposed in his fourth report a new article 20 dealing with the question of reservations from a procedural standpoint.[399] The first two paragraphs of this article, entitled "Procedure regarding reservations", corresponded to article 18, paragraphs 2 and 3, and article 19 of the former draft, and read as follows:

> "1. A reservation must be in writing. If put forward subsequently to the adoption of the text of the treaty, it must be notified to the depositary or, where there is no depositary, to the other interested States.[400]
>
> "2. A reservation put forward upon the occasion of the adoption of the text or upon signing a treaty subject to ratification, acceptance or approval, shall be effective only if the reserving State formally confirms the reservation when ratifying, accepting or approving the treaty."[401]

240. During the discussions in the Commission on second reading, few observations were made on the formulation of reservations.[402] Nevertheless, interesting comments were made on the "status" of a reservation formulated at the time of signing, pending its confirmation at the time of ratification.[403] In this connection, the Special Rapporteur believed that the rules on acceptance of reservations should be applicable only after the reservation was confirmed; "otherwise, it might be difficult to frame a rule governing the case of tacit consent".[404] After certain changes had been made to it by the Drafting Committee, new article 20 was adopted by the Commission.[405]

241. Draft article 20, paragraph 2, as finally adopted, differed from the current text of article 23, paragraph 2, only by the inclusion of a reference to reservations formulated "on the occasion of the adoption of the text",[406] a reference that was

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[397] *Yearbook ... 1965*, vol. II, pp. 46-47. Japan also submitted draft articles which roughly recapitulated the Commission's wording concerning the moment of formulation of reservations (*Yearbook ... 1966*, vol. II, p. 306).

[398] Ibid., vol. II, p. 47. This allusion to a "code of recommended practices" testifies to an interesting intuition of the needs which the elaboration of the Guide to Practice is designed to meet.

[399] Ibid., pp. 53-54.

[400] This paragraph recapitulates the preliminary clause of former art. 18, para. 2 (a), and in a simplified form, para. 3 of that article.

[401] This paragraph was a slightly simplified version of former art. 18, para. 2 (b). For their part, paras. 3 and 4 dealt with express and tacit acceptance of a reservation and paras. 5 and 6 with objections to reservations.

[402] See, however, the observations by Mr. Ruda (*Yearbook ... 1965*, vol. I, p. 154, para. 71) and Mr. Rosenne (ibid., p. 264).

[403] See, in particular, the comments by Mr. Bartos and Mr. Lachs (ibid., p. 269).

[404] Ibid.

[405] Ibid., p. 284.

[406] "If formulated on the occasion of the adoption of the text or upon signing the treaty ..." (*Yearbook ... 1960*, vol. II, p. 208).

deleted at the Vienna Conference under circumstances that have been described as "mysterious".[407] The commentary on this provision reproduces the 1962 text[408] almost verbatim and adds:

> "Paragraph 2 concerns reservations made at a later stage [after negotiation]: on the occasion of the adoption of the text or upon signing the treaty subject to ratification, acceptance or approval. Here again the Commission considered it essential that, when definitely committing itself to be bound, the State should leave no doubt as to its final standpoint in regard to the reservation. The paragraph accordingly requires the State formally to confirm the reservation if it desires to maintain it. At the same time, it provides that in these cases the reservation shall be considered as having been made on the date of its confirmation, a point which is of importance for the operation of paragraph 5 of article 17 [20 in the text of the Convention].[409]

242. The rule in article 23, paragraph 2, of the 1969 Convention was reproduced in its essence by Paul Reuter in his fourth and fifth reports on the law of treaties between States and international organizations or between two or more international organizations, with only the drafting changes made necessary by the inclusion of international organizations[410] and the introduction of the concept of "formal confirmation" (with the risks of confusion which this implies between that concept and the notion of "simple" confirmation of the reservation in article 23[411]). This provision was adopted on first reading with the new drafting changes made necessary by the introduction into the draft of the concept of "formal confirmation" — equivalent to ratification for international organizations — in the form of two separate articles, owing to the distinction that was adopted for a while between, on the one hand, treaties between several international organizations and, on the other hand, treaties between States and one or more international organizations or between international organizations and one or more States.[412] The two articles 23 and 23 *bis*, which received no comments from Governments,[413] were again combined in a single provision on second reading. This provision differs from article 23 of the 1969 Convention only by the mention of international organizations and the mechanism of formal confirmation (of the treaty itself).[414] The Vienna

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[407] "In paragraph 2, the phrase 'on occasion of the adoption of the text' mysteriously disappeared from the ILC text, when it was finally approved by the Conference" (J. M. Ruda, "Reservations to Treaties", *RCADI* 1975-III, vol. 146, p. 195). The Special Rapporteur found no trace of any amendment to this effect in the official records of the Conference.

[408] See para. 238 above.

[409] *Yearbook ... 1966*, vol. II, p. 208.

[410] *Yearbook ... 1975*, vol. II, p. 38, and *Yearbook ... 1976*, vol. II, Part One, p. 146.

[411] See the discussions on this subject at the 1434th meeting on 6 June 1977, *Yearbook ... 1977*, vol. I, pp. 101-103. At the same meeting, a discussion began on the notion of international organizations having the capacity to become parties to a treaty (ibid.).

[412] See the text and its commentary in *Yearbook ... 1976*, vol. II, Part One, p. 146 (fifth report of Paul Reuter) and *Yearbook ... 1977*, vol. II, Part Two, pp. 115-116 (report of the Commission — two separate articles; this distinction was abandoned in 1981 — see the tenth report of Paul Reuter, *Yearbook ... 1981*, vol. II, Part One, p. 63). See also the discussions at the 1434th and 1451st meetings (6 June and 1 July 1977), *Yearbook ... 1977*, vol. I, pp. 101-103 and 195-196).

[413] The Council of Europe stated, however, that the rule contained in paragraph 2 of the article was consistent with its practice.

[414] Tenth report of Paul Reuter, *Yearbook ... 1981*, vol. II, Part One, p. 63, and report of the Commission, *Yearbook ... 1982*, vol. II, Part Two, p. 37.

Conference of 1986 adopted the text prepared by the International Law Commission without making any changes to the French text.[415]

The obligation to confirm reservations made when signing

243. While there can be hardly any doubt that at the time of its adoption, article 23, paragraph 2, of the 1969 Convention pertained more to progressive development than to codification in the strict sense,[416] one can probably consider the obligation to formally confirm reservations formulated when treaties in formal form are signed as having become part of positive law. Crystallized by the 1969 Convention and confirmed in 1986, the rule is followed in practice and seems to satisfy an *opinio necessitatis juris* which permits a customary value to be assigned to it.

244. Thus, in an aide-mémoire dated 1 July 1976, the United Nations Legal Counsel, describing the "practice of the Secretary-General in his capacity as depositary of multilateral treaties regarding ... reservations and objections to reservations relating to treaties not containing provisions in that respect", relied on article 23, paragraph 2, of the Vienna Convention of 1969 in concluding that: "If formulated at the time of signature subject to ratification, the reservation has only a declaratory effect, having the same legal value as the signature itself. It must be confirmed at the time of ratification; otherwise, it is deemed to have been withdrawn".[417] The Council of Europe changed its practice in this regard in 1980;[418] and in their answers to the Commission's questionnaire on reservations to treaties, the States which replied to question 1.10.2[419] indicated that, in general, they confirmed reservations formulated when the treaty was signed at the time of ratification or accession.[420]

245. Curiously, however, the practice of the Secretary-General of the United Nations is inconsistent with the conviction expressed by the Legal Counsel in

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[415] The Chairman of the Drafting Committee, Mr. Al-Khasawneh, stated that a correction had been made to the English text (replacing "by a treaty" with "by the treaty" — 5th plenary meeting, 18 March 1986, records of the Conference, p. 15, para. 63.

[416] See the first report of Sir Humphrey Waldock, op. cit., para. 236. See also: D. W. Greig, "Reservations: Equity as a Balancing Factor?", *Australian Yearbook of International Law*, 1995, p. 28, or Frank Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, T. M. C. Asser Institute, Swedish Institute of International Law, Studies in International Law, vol. 5, 1988, p. 41.

[417] *Yearbook ... 1976*, p. 211. See also Marjorie M. Whiteman, *Digest of International Law*, vol. 14, 1970, pp. 158-159.

[418] Cf. Frank Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, loc. cit., and Jörg Polakiewicz, *Treaty-Making in the Council of Europe*, Publications du Conseil de l'Europe, 1999, p. 96.

[419] "If reservations were formulated at the time when the treaty was signed, were they formally confirmed when the State expressed its definitive consent to be bound?"

[420] Cf. the replies by Japan, Switzerland (with the exception, it would appear, however, of the International Telecommunications Convention of 22 December 1982 and the additional protocols thereto, but no explanation is given concerning this exception), France and Mexico. Bolivia indicates that on one occasion it formulated reservations when signing but did not confirm them, since they were the subject of a protocol annexed to the treaty. In its reply to question 1.10.1 ("Was the timing of the formulation of the reservations based on any particular considerations? If so, what considerations?"), Denmark, which states that it formulates all its reservations when expressing definitive consent to be bound, expressly bases its answer on art. 23, para. 2, of the Convention.

1976,[421] since the former includes in the valuable publication entitled *Multilateral treaties deposited with the Secretary-General* reservations formulated when the treaty was signed, whether or not they were confirmed subsequently,[422] even on the assumption that the State formulated other reservations when expressing its definitive consent to be bound.

246. In legal writing, the rule laid down in article 23, paragraph 2, of the Vienna Conventions of 1969 and 1986 is the object of what now appears to be general approval,[423] even if that was not always true in the past.[424] In any event, whatever arguments might be advanced against it, they would not be of such a nature as to challenge a clear rule appearing in the Vienna Conventions that the Commission has decided to follow in principle, except in case of an overwhelming objection.

247. Accordingly, it seems both necessary and desirable to recapitulate in the Guide to Practice, in the form of a draft guideline, the rule laid down in article 23, paragraph 2, of the Vienna Convention of 1986.[425] Two problems arise, however, with regard to the specific formulation of this draft.

248. First, is it appropriate simply to reproduce the wording of article 23, paragraph 2, or should it be supplemented to take into account the possibility afforded to a successor State to formulate a reservation when it makes a notification of succession in accordance with draft guideline 1.1, which thus rounds out the definition of reservations contained in article 2, paragraph 1 (d) of the 1986 Convention? The answer is not very simple. At first glance, the successor State can either confirm or invalidate an existing reservation made by the predecessor State,[426] or formulate a new reservation when it makes a notification of succession,[427] in neither of these two cases, therefore, is the successor State led to confirm a reservation when signing. Nevertheless, under article 18, paragraphs 1 and 2, of the 1986 Convention, a newly independent State may, under certain conditions, establish through a notification of succession its capacity as a contracting State or party to a multilateral treaty which was not in force on the date of the State succession and to which the predecessor State was itself a contracting State. Under

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[421] See para. 244 above.

[422] Examples of reservations formulated when signing and not confirmed subsequently: the reservations made by the Islamic Republic of Iran and Peru to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988 (United Nations, *Multilateral treaties deposited with the Secretary-General: Status as at 31 December 1999*, vol. I, pp. 334-346) and those made by Turkey to the Customs Convention on Containers of 2 December 1972 (ibid., p. 487). Examples of reservations made when signing and confirmed when expressing consent to be bound: the reservation made by the United Kingdom of Great Britain and Northern Ireland to the Protocol to the Agreement on the Importation of Educational, Scientific and Cultural Materials of 22 November 1950 (ibid., vol. II, p. 66), the reservations made by Argentina and Venezuela to the Agreement establishing the Common Fund for Commodities of 27 June 1980 (ibid., vol. II, pp. 139-140), and the reservation made by Slovakia to the Convention on the Safety of United Nations and Associated Personnel of 9 December 1994 (ibid., p. 121).

[423] See, in particular, D. W. Grieg, "Reservations: Equity as a Balancing Factor?", *AYIL*, 1995, p. 28, and P. H. Imbert, *Les réserves aux traités multilatéraux*, Paris, Pedone, 1979, p. 285.

[424] Cf. Imbert, op. cit., pp. 253-254.

[425] Rather than the 1969 formulation, which is less comprehensive because international organizations are omitted.

[426] Cf. article 20, para. 1, of the 1978 Vienna Convention on Succession of States in Respect of Treaties.

[427] Cf. article 20, para. 2.

article 2 (f) of the Vienna Convention of 1969 and article 2 (k) of the 1986 Convention, however, "'contracting State' means a State which has consented to be bound by the treaty, whether or not the treaty has entered into force" — a State, not a mere signature. It follows, conversely, that there can be no "succession to the signing" of a treaty (in formal form[428])[429] and that the concept of notification of succession should not be introduced into draft guideline **2.2.1.**[430]

249. Second, it might be asked whether the Commission should take account, in the preparation of this draft, of draft guideline 1.1.2 ("Cases in which a reservation may be formulated"), which provides that:

> "The cases in which a reservation may be formulated contained in guideline 1.1 include all the means of expressing consent to be bound by a treaty referred to in article 11 of the Vienna Convention of 1969 and 1986 on the law of treaties."

The problem does not arise with regard to the designation of the moment when the confirmation should take place, since the formula contained in article 23, paragraph 2, of the Vienna Conventions of 1969 and 1986 is equivalent to the one adopted by the Commission in draft guideline 1.1.2 ("when expressing its consent to be bound"). It might be thought, however, that the number of cases to which article 23, paragraph 2, seems to limit the possibility of subordinating definitive consent to be bound (ratification, act of formal confirmation, acceptance or approval) is too small and does not correspond to the one in article 11.

250. In the view of the Special Rapporteur, however, such a concern is excessive; the differences in wording between article 11 and article 23, paragraph 2, of the Vienna Conventions of 1969 and 1986 lie in the omission from the latter of these provisions of two possibilities contemplated in the former: "exchange of instruments constituting a treaty" and "any other means if so agreed".[431] The probability that a State or an international organization would subordinate the expression of its

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[428] See paras. 259-260 below.

[429] The publication *Multilateral treaties deposited with the Secretary-General — Status as at 31 December 1999* mentions, however — in the footnotes and without special comment — reservations formulated when signing by a predecessor State and apparently not formally confirmed by the successor State or States; see, for example, Czechoslovakia's reservations to the 1982 United Nations Convention on the Law of the Sea, noted in connection with the Czech Republic and Slovakia (United Nations publication, Sales No. E.00.V.2, vol. II, pp. 239-240, note 4). Moreover, irrespective of the question of reservations, some States expressly indicated that they intended to succeed to the signature of a predecessor State (see, for example, the notifications made by the Czech Republic and Slovakia concerning the United Nations Convention on the Law of the Sea (ibid., p. 239) and the Vienna Convention on Succession of States in Respect of Treaties (ibid., p. 277).

[430] According to Claude Pilloud, "it seems that it should be recognized that in applying the rule provided for in article 23, paragraph 2, by analogy to reservations expressed when signing, States which have made a declaration of continuation" to the Geneva Conventions of 1949 "should, if they had meant to endorse the reservations expressed [by the predecessor State], so state expressly in their declaration of continuation" ("Les réserves aux Conventions de Genève de 1949", *Revue internationale de la Croix-Rouge*, March-April 1976, p. 135. It is doubtful whether such an analogy could be made; the matter will be considered in a future report on succession to reservations.

[431] For a similar comment concerning the comparison of article 2, para. 1 (d), and article 11, see the commentary on draft guideline 1.1.2, *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), pp. 205-206, para. (8).

definitive consent to be bound by a multilateral treaty subject to reservations to one of these modalities is sufficiently low that it does not seem useful to overburden the wording of draft guideline **2.2.1** or to include, in chapter 2 of the Guide to Practice, a draft guideline equivalent to draft guideline 1.1.2. No doubt it will be sufficient to mention this point in the commentary.

251. Under these circumstances, the wording of draft guideline **2.2.1** can be modelled on that of article 23, paragraph 2, of the Vienna Convention of 1986:

> **2.2.1** *Reservations formulated when signing and formal confirmation*
>
> *If formulated when signing the treaty subject to ratification, act of formal confirmation, acceptance or approval, a reservation must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.*

252. It may be asked, furthermore, whether a reservation can be formulated when initialling[432] or signing a treaty *ad referendum*, which are mentioned along with signing in article 10 of the Vienna Conventions of 1969 and 1986 as methods of authenticating the text of a treaty. The answer to this question is certainly affirmative: nothing prevents a State or an international organization from indicating formally to its partners the "reservations" which it has regarding the adopted text at the authentication stage,[433] or, for that matter, at any previous stage of negotiation.

253. This had, moreover, been contemplated by the International Law Commission in draft article 19 (which became article 23 of the 1969 Convention), of which paragraph 2, as it appeared in the final text of the draft articles adopted in 1966, provided that: "If formulated on the occasion of the adoption of the text ... a reservation must be formally confirmed by the reserving State when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation".[434] Commenting on this provision, the Commission stated:

> "(3) Statements of reservations are made in practice at various stages in the conclusion of a treaty. Thus, a reservation is not infrequently expressed during the negotiations and recorded in the minutes. Such embryo reservations have sometimes been relied upon afterwards as amounting to formal reservations. The Commission, however, considered it essential that the State concerned should formally reiterate the statement when signing, ratifying, accepting, approving or acceding to a treaty in order that it should make its intention to formulate the reservation clear and definitive. Accordingly, a statement during the negotiations expressing a reservation is not, as such, recognized in article 16 as a method of formulating a reservation and equally receives no mention in the present article."[435]

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[432] Cf. Renata Szafarz, "Reservations to Multilateral Treaties", *Polish Yearbook of International Law*, 1970, p. 295.

[433] On authentication "as a distinct part of the treaty-making process", see the commentary on article 9 of the International Law Commission's draft articles on the law of treaties (which became article 10 at the Vienna Conference), *Yearbook ... 1966*, vol. II, p. 212.

[434] See *Yearbook ... 1966*, vol. II, p. 208.

[435] Ibid., p. 208, para. (3) of the commentary.

254. As indicated above,[436] the reference to the adoption of the text disappeared from the text of article 23, paragraph 2, of the Vienna Convention of 1969 under "mysterious" circumstances during the Vienna Conference of 1968-1969, probably out of concern for consistency with the wording of the *chapeau* of article 19 (the summary records of the Conference give no indication about this, however). The question arises whether it might not be appropriate to reinstate the reference in the Guide to Practice.

255. In the view of the Special Rapporteur, the Commission would be making a useful clarification by reinstating it, given that:

- On the one hand, any reservation formulated prior to the expression of definitive consent to be bound[437] by the treaty must be confirmed by its author; that is the very purpose of this clarification, and
- On the other hand, there does not seem to be any reason to limit the clarification to "embryonic" reservations formulated when adopting or authenticating the text; the obligation to confirm formally is, of course, required, especially when the "intention to formulate a reservation" is expressed at a prior stage of negotiation.

256. This clarification could be the subject of a draft guideline **2.2.2**, worded as follows:

> **2.2.2** *Reservations formulated when negotiating, adopting or authenticating the text of the treaty and formal confirmation*
>
> If formulated when negotiating, adopting or authenticating the text of the treaty, a reservation must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case, the reservation shall be considered as having been made on the date of its confirmation.

257. This wording is taken from that of draft guideline **2.2.1**,[438] itself modelled on article 23, paragraph 2, of the Vienna Convention of 1986, and the question arises whether it might not be advantageous to combine the two drafts. This would "economize" on provisions, but would have the drawback of altering the text of the Vienna Convention. It may, of course, be asserted that the Commission did the same thing with regard to draft guideline 1.1; however, the question was not posed in exactly the same terms; the definition of reservations adopted in the draft "is none other than the composite text of the definitions contained in the Vienna Conventions of 1969, 1979 and 1986, to which no changes have been made".[439] The combining in a single draft of the texts proposed for draft guidelines **2.2.1** and **2.2.2** would not be of the same nature and would be tantamount to adding to the text of the Vienna Conventions a possibility that they did not contemplate. For this reason, the Special Rapporteur is inclined to favour two separate drafts.

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[436] Para. 241.

[437] "Negotiated reservations", that is to say, reservation clauses inserted in a treaty during negotiation (see paras. 164-171 above), are often adopted following the expression by one or more States of their disagreement with some of the proposed provisions; such expressions of disagreement may be regarded as "embryonic reservations".

[438] See para. 251 above.

[439] Para. (1) of the commentary on draft guideline 1.1, *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), p. 196.

258. If a majority of members of the Commission were of a different view, the text of the draft might read as follows:

> *Reservations formulated when negotiating, adopting or authenticating or signing the text of the treaty and formal confirmation*
>
> *If formulated when negotiating, adopting or authenticating the text of the treaty or when signing the treaty subject to ratification, an act of formal confirmation, acceptance or approval, a reservation must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case, the reservation shall be considered as having been made on the date of its confirmation.*

259. Whatever solution is adopted in this respect,[440] the proposed wording (which is, in any event, faithful to the Vienna text) clearly implies that the rule thus codified applies only to treaties in formal form, those that do not enter into force solely by being signed.[441] On the other hand, with regard to treaties not requiring any post-signing formalities in order to enter into force, which are referred to in French legal writing as "agreements in simplified form",[442] it is self-evident that, if formulated when the treaty is signed, a reservation becomes effective immediately, without any formal confirmation being necessary or even conceivable.[443]

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[440] What is involved is not a fundamental issue. The solution to be adopted by the Commission in this regard will constitute a precedent, however, for the question cannot fail to arise again with respect to other provisions of the Vienna Conventions. Taking into account the advantage of deviating as little as possible from the Conventions, it seems to the Special Rapporteur that the Commission should take another look at the matter before combining draft guidelines **2.2.1** and **2.2.2**, as envisaged in para. 258 above.

[441] On the distinction between treaties in formal form and agreements in simplified form, see, in particular: C. Chayet, "Les accords en forme simplifiée", *AFDI* 1957, pp. 1-13; P. Daillier and A. Pellet, *Droit international public (Nguyen Quoc Dinh)*, Paris, *LGDJ*, 6th ed., 1999, pp. 136-144; P. F. Smets, *La conclusions des accords en forme simplifiée*, Brussels, Bruylant, 1969, 284 pp. This distinction is more common among authors writing in the Roman-Germanic tradition than among those schooled in common law, which is more concerned with executive agreements, a concept that does not fully coincide with the notion of agreements in simplified form (see G. J. Horvath, "The Validity of Executive Agreements", *OZORV*, 1979, pp. 105-131). Sir Ian Sinclair (*The Vienna Convention on the Law of Treaties*), Manchester University Press, 1984, p. 41) and Ian Brownlie (*Principles of Public International Law*, Oxford University Press, 5th ed., 1998, p. 611), however, mentioned the concept of "agreements" or "treaties in simplified form" in connection with discussions on the law of treaties in the International Law Commission.

[442] While the procedure involving agreements in simplified form is more commonly used for concluding bilateral rather than multilateral treaties, it is not at all unknown in the second case, and major multilateral agreements may be cited which have entered into force solely by being signed. This is true, for example, of the General Agreement on Tariffs and Trade of 1947 (at least in terms of the entry into force of the bulk of its provisions following the signing of the Protocol of Provisional Application), the Geneva Declaration on the Neutrality of Laos of 23 July 1962 or the Agreement establishing a food and fertilizer technology centre for the Asian and Pacific region, *United Nations Treaty Series*, vol. 704, No. 10100, p. 18. There are also "mixed" treaties that can, if the Contracting Parties so choose, enter into force solely by being signed or subject to ratification (cf. article XIX of the Agreement of 20 August 1971 concerning the International Telecommunications Satellite Organization (Intelsat); see also the following footnote).

[443] The Special Rapporteur is not aware, however, of any clear example of a reservation made at the time when a multilateral agreement in simplified form was signed. This eventuality certainly cannot be ruled out, however; as the preceding footnote indicates, there are also "mixed treaties"

260. In truth, however, this rule derives from the text of article 23, paragraph 2, of the Vienna Conventions of 1969 and 1986; it is reproduced in draft guideline **2.2.1** and supplemented by draft guideline **2.2.2**. Nevertheless, given the practical nature of the Guide to Practice, it would probably not be superfluous to clarify this explicitly in a draft guideline **2.2.3**:

> **2.2.3** *Non-confirmation of reservations formulated when signing [an agreement in simplified form] [a treaty that enters into force solely by being signed]*[444]
>
> *A reservation formulated when signing [an agreement in simplified form] [a treaty that enters into force solely by being signed] does not require any subsequent confirmation.*

261. It is self-evident, however, that if an "embryonic reservation" to an agreement in simplified form is formulated when negotiating, adopting or authenticating the text of a treaty, it must be confirmed when signing. Nevertheless, just as, in this case, signing constitutes the expression of definitive consent to be bound, the possibility is covered expressly by draft guidelines **2.2.1** and **2.2.2** ("when expressing consent to be bound"), and it seems completely unnecessary to repeat it in a separate draft guideline.

262. There is, moreover, another hypothetical case in which the confirmation of a reservation formulated when signing appears to be superfluous, namely, where the treaty itself provides expressly for such a possibility without requiring confirmation. Thus, for example, article 8, paragraph 1, of the Council of Europe Convention on reduction of cases of multiple nationality and military obligations in cases of multiple nationality of 1963 provides that:

> "Any Contracting Party may, *when signing this Convention or* depositing its instrument of ratification, acceptance or accession, declare that it avails itself of one or more of the reservations provided for in the Annex to the present Convention" (italics added).[445]

263. In a case of this kind, it seems that practice consists of not requiring a party which formulates a reservation when signing to confirm it when expressing definitive consent to be bound; thus, to return to the previous example, France made a reservation when it signed the 1963 Convention and did not confirm it subsequently.[446] Likewise, Hungary and Poland did not confirm their reservation to

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which can, if the parties so choose, enter into force solely upon signature or following ratification, and which are subject to reservations or contain reservation clauses (cf. the 1971 Convention on Psychotropic Substances (art. 32), the Code of Conduct for Liner Conferences of 6 April 1974 or the International Convention relating to the arrest of seagoing ships of 1999 (art. 12, para. 2)).

[444] The alternative draftings that have been proposed relate to the fact that, as indicated in the preceding footnote, the term "agreements in simplified form", familiar to jurists schooled in the Roman law tradition, might bewilder those with training in common law.

[445] See also, among numerous examples: article 17 of the New York Convention on the Reduction of Statelessness, article 30 of the Council of Europe Convention on Mutual Administrative Assistance on Tax Matters of 1988, article 29 of the European Convention on Nationality of 1997 or article 24 of the Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons of 1989.

[446] Council of Europe, European Committee on Legal Cooperation (CCJ), *CCJ Conventions and reservations to those Conventions*, Note by the Secretariat, CCJ (99) 36, Strasbourg, 30 March

article 20 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which provides, in its article 28, paragraph 1, that such a reservation can be made when signing. Nor did Luxembourg confirm its reservation to the Convention relating to the Status of Refugees of 28 July 1951, or Ecuador its reservation to the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, of 17 December 1973.[447] It is true that other States[448] nonetheless confirmed their reservations, to the same provision of the Convention against Torture at the time of ratification. In the view of the Special Rapporteur, reservations made when signing the Convention against Torture were sufficient in and of themselves. While nothing prevented the reserving States from confirming them,[449] nothing compelled them to do so. The rule set out in article 23, paragraph 2, of the Vienna Conventions should be applicable only where the treaty is silent; otherwise, the provisions providing for the possibility of reservations when signing would have no useful effect.

264. Despite the uncertainties in practice — which may be explained by the fact that if a formal confirmation in a case of this kind is not essential, it is also not ruled out — it does not seem futile to endorse the "minimum" practice (this seems logical, since the treaty expressly provides for the formulation of reservations when signing[450]) by embodying it in a draft guideline that might read as follows:

1999, p. 11. The same applied to Belgium's reservations to the 1988 Convention on Mutual Administrative Assistance on Tax Matters (ibid., p. 55).

[447] *Multilateral treaties deposited with the Secretary-General* ..., vol. I, p. 224 and p. 214; ibid., vol. I, p. 265, and vol. II, p. 115. The Hungarian reservation was subsequently withdrawn.

[448] Belarus, Bulgaria (reservation subsequently withdrawn), Czechoslovakia (reservation subsequently withdrawn by the Czech Republic and Slovakia), Morocco, Tunisia and Ukraine (reservation subsequently withdrawn); see ibid., vol. I, pp. 212-214.

[449] And such "precautionary confirmations" are quite common (see, for example, the reservations by Belarus, Brazil (which, however, confirmed only two of its three initial reservations), Hungary, Poland, Turkey or Ukraine to the 1971 Convention on Psychotropic Substances, ibid., vol. I, pp. 327-329).

[450] If this principle was not recognized, many unconfirmed reservations would have to be deemed illegal (or without effect), even where the States which formulated them did so on the basis of the text of the treaty itself.

2.2.4 *Reservations formulated when signing for which the treaty makes express provision*

A reservation formulated when signing a treaty, where the treaty makes express provision for an option on the part of a State or an international organization to formulate a reservation at such a time, does not require formal confirmation by the reserving State or international organization when expressing its consent to be bound by the treaty.

Time of formulation of interpretative declarations (recapitulation)

265. The third report on reservations to treaties discusses in some detail the time at which an interpretative declaration may be formulated.[451] The report indicates in particular that a "simple" interpretative declaration may be formulated at any time, unless otherwise stipulated by the treaty that it concerns, whereas a conditional interpretative declaration may be formulated only when signing or when expressing consent to be bound, since by definition it makes participation in the treaty by the declarant State or international organization subject to certain conditions.

266. These views were accepted by the Commission and are reflected in draft guideline 1.2, which defines interpretative declarations independently of any time factor,[452] and draft guideline 1.2.1, which on the contrary specifies that a conditional interpretative declaration, like a reservation, is "a unilateral statement formulated by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty ...".[453]

267. However, in the case of this second hypothesis, the Commission noted that if the conditional interpretative declaration was formulated when signing the treaty, it would "probably" be "confirmed at the time of the expression of definitive consent to be bound".[454] There is no logical reason for advocating one solution for reservations and another for conditional interpretative declarations.

268. It will be noted that in practice States wishing to make their participation in a treaty subject to a specified interpretation of the treaty generally confirm their interpretation when stating it at the time of signature or at any earlier point in the negotiations. The following are examples:

– Germany and the United Kingdom, upon ratifying the Basel Convention of 1989 on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, confirmed "declarations"[455] that could be regarded as being conditional;[456]

[451] A/CN.4/491/Add.4, paras. 336-346.

[452] See paras. 21-32 of the commentary to draft guideline 1.2, *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), pp. 234-239.

[453] See paras. 15-18 of the commentary to draft guideline 1.2.1 (ibid., pp. 248-249).

[454] Ibid., note 346, p. 249.

[455] See *Multilateral Treaties deposited with the Secretary-General*, ..., vol. II, pp. 356-357.

[456] Moreover, the question may be asked whether confirmation of an interpretative declaration made when signing constitutes an indication (among others) of its conditional nature.

- Monaco proceeded in the same manner when it signed and then ratified the 1966 Covenant on Civil and Political Rights;[457]

- Austria set out in its instrument of ratification of the European Convention of 6 May 1959 on the Protection of the Archaeological Heritage a declaration made when signing;[458]

- The European Community, when approving the 1991 Espoo Convention, also confirmed a declaration that it had made when signing.[459]

269. It is thus appropriate to transpose to conditional interpretative declarations the rules governing the formal confirmation of reservations formulated when signing (draft guideline 2.2.1) or when negotiating, adopting or authenticating the text of the treaty (draft guideline 2.2.2). Two problems arise, however.

270. Firstly, there is a methodological problem as to whether to include one or more draft guidelines reproducing the substance of the corresponding draft text on the confirmation of reservations formulated when signing, or whether it would suffice to follow the procedure adopted by the Commission in draft guideline 1.5.2 on "interpretative declarations in respect of bilateral treaties",[460] and to refer to draft guidelines 2.2.1 and 2.2.2. The chief reason for adopting that procedure in draft guideline 1.5.2 was that the Commission had decided not to deal with "reservations" to bilateral treaties in the remainder of the Guide to Practice.[461] This reason no longer applies: even if the Guide to Practice is to focus essentially on reservations, it has been agreed that wherever appropriate the Guide should also contain guidelines on the legal regime of interpretative declarations (simple or conditional).[462] It would therefore be desirable to include in the Guide substantive provisions on the obligation to confirm formally conditional interpretative declarations formulated prior to expressing definitive consent to be bound, unless the corresponding rules on reservations are simply transposed to conditional interpretative declarations.[463]

271. If the Commission agrees to this initial suggestion, it will still have to take a position on a second problem concerning form: whether one or two draft guidelines should be devoted to the question of formal confirmation of conditional interpretative declarations, as in the case of reservations. In the Special Rapporteur's view, this problem should be approached from a different angle. It was in order to avoid "touching up" the provisions of the Vienna Conventions on the law of treaties that he expressed a clear preference for adopting two separate draft guidelines: one linked to the time of the confirmation of the reservations formulated when signing, and the other to negotiations.[464] This consideration does not apply in the case of

[457] *Multilateral Treaties deposited with the Secretary-General*, ..., vol. II, p. 139.

[458] Web site: http://conventions.coe.in/treaty/FR/cadreprincipal/htm.

[459] *Multilateral treaties deposited with the Secretary-General*, ..., vol. II, p. 363. See also the declarations by Italy and the United Kingdom on the 1992 Rio Convention on Biological Diversity, (ibid., pp. 379-380).

[460] This draft guideline reads: "Draft guidelines 1.2 and 1.2.1 are applicable to interpretative declarations in respect of multilateral as well as bilateral treaties".

[461] See draft guideline 1.5.1 and paragraphs 19 and 20 of the commentary thereto (*Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10 (A/54/10), p. 301*).

[462] See para. 218 above.

[463] Here again (see note 440 above), this is not a crucial problem, but the decision taken by the Commission on this matter will constitute a precedent, which should probably be followed in the subsequent parts and chapters of the Guide to Practice.

[464] See para. 257 above.

interpretative declarations, in respect of which the 1969 and 1986 Conventions have nothing at all to say.

272. It would therefore be reasonable to transpose draft guidelines 2.2.1 and 2.2.2 to interpretative declarations and to combine them, as in the case of the alternative proposed in paragraph 258 above for reservations:

> **2.4.4** *Conditional interpretative declarations formulated when negotiating, adopting or authenticating or signing the text of the treaty and formal confirmation*
>
> *If formulated when negotiating, adopting or authenticating the text of the treaty or when signing the treaty subject to ratification, an act of formal confirmation, acceptance or approval, a conditional interpretative declaration must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case, the declaration shall be considered as having been made on the date of its confirmation.*

273. For the same reasons, it would seem legitimate to transpose to interpretative declarations[465] draft guidelines 2.2.3 and 2.2.4 concerning non-confirmation of reservations formulated when signing an agreement in simplified form or of a treaty making express provision for them. The draft guidelines in question might read as follows:

> **2.4.5** *Non-confirmation of interpretative declarations formulated when signing [an agreement in simplified form] [a treaty that enters into force solely by being signed]*
>
> *An interpretative declaration formulated when signing [an agreement in simplified form] [a treaty that enters into force solely by being signed] does not require any subsequent confirmation.*
>
> **2.4.6** *Interpretative declarations formulated when signing for which the treaty makes express provision*
>
> *An interpretative declaration formulated when signing a treaty, where the treaty makes express provision for an option on the part of a State or an international organization to formulate such a declaration at such a time, does not require formal confirmation by the reserving State or international organization when expressing its consent to be bound by the treaty.*

274. However, precisely because they may in principle be formulated at any time,[466] simple interpretative declarations pose a particular problem not encountered in the case of reservations and which does not arise in the case of conditional interpretative declarations either: what happens in cases where the treaty to which they apply expressly provides that they may be formulated only at specified times,

[465] It is unnecessary to distinguish between conditional interpretative declarations and simple interpretative declarations, because there is in any event no obligation to confirm simple interpretative declarations, which unless otherwise provided may be formulated at any time (see paras. 265-266 above).

[466] See also paras. 265-266 above.

as in the case of article 310 of the United Nations Convention on the Law of the Sea?[467]

275. Clearly, in such cases, the contracting parties may make interpretative declarations such as those envisaged in the relevant provision only at the time or times specified in the treaty. This is so obvious as to prompt the question as to whether this needs to be spelled out in a guideline in the Guide to Practice.

276. However, there are two reasons for including such a provision. Firstly, this could be an opportunity to recall that a simple interpretative declaration may in principle be formulated at any time — which none of the draft guidelines adopted so far currently do, other than draft guideline 1.2, which does so by omission, since it does not introduce any time element into the definition of interpretative declarations.[468] Secondly, such a clarification is in fact neither any more nor any less superfluous than those set out, for example, in article 19 (a) and (b) of the 1969 and 1986 Vienna Conventions, which deal with the option of entering reservations.[469]

277. The existence of an express treaty provision limiting the option of formulating interpretative declarations is not the only instance in which a State or an international organization is prevented, *ratione temporis,* from formulating an interpretative declaration. The same applies in cases where the State or organization has already formulated an interpretation which its partners have taken as a basis or were entitled to take as a basis (estoppel). In such a case, the author of the initial declaration is prevented from modifying it. This hypothesis will be considered below in section 2, together with questions relating to the modification of reservations and interpretative declarations. However, it should be reflected in draft guideline 2.4.3.

278. Moreover, this draft guideline must exclude special rules relating to conditional interpretative declarations. It might read as follows:

> **2.4.3**. *Times at which an interpretative declaration may be formulated.*
>
> *Without prejudice to the provisions of guidelines 1.2.1,* ***2.4.4, 2.4.7 and 2.4.8****, an interpretative declaration may be formulated at any time, [unless otherwise provided by an express provision of the treaty] [the treaty states that it may be made only at specified times].*

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[467] "Article 309 does not preclude a State, when signing, ratifying or acceding to this Convention, from making declarations or statements, however phrased or named, with a view, *inter alia*, to the harmonization of its laws and its regulations with the provisions of this Convention, provided that such declarations or statements do not purport to exclude or to modify the legal effects of the provisions of this Convention in their application to that State." Also see, for example, article 26, paragraph 2, of the Basel Convention of 22 March 1989 on the Control of Transboundary Movements of Hazardous Wastes, and article 43 of the New York Agreement of 4 August 1995 on straddling fish stocks.

[468] See paras. 265-266 .

[469] Article 19 of the 1969 Convention reads: "a State may ... formulate a reservation unless: (a) the reservation is prohibited by the treaty; (b) the treaty provides that only specified reservations which do not include the reservation in question may be made".

(b) Late reservations and interpretative declarations

Late reservations

279. Unless otherwise provided by a treaty, which is always possible, the expression of definitive consent be bound constitutes for the contracting parties the last time (and in view of the requirement concerning formal confirmation of reservations formulated during negotiations and when signing, the only time) when a reservation may be formulated.[470] This rule, which is unanimously recognized in the relevant doctrine,[471] and which arose from the very definition of reservations and is also implied by the "chapeau" of article 19 of the 1969 and 1986 Vienna Conventions, is widely observed in practice.[472] It was regarded as forming part of positive law by the International Court of Justice in its Judgment of 20 December 1988 in the case concerning *Border and Transborder Armed Actions:*

> "... Article LV of the Pact of Bogotá enables the parties to make reservations to that instrument which 'shall, with respect to the State that makes them, apply to all signatory States on the basis of reciprocity'. In the absence of special procedural provisions, those reservations may, in accordance with the rules of general international law on the point as codified by the 1969 Vienna Convention on the Law of Treaties, be made only at the time of signature or ratification of the pact or at the time of adhesion to that instrument."[473]

280. Moreover, it has interesting specific consequences — which the Special Rapporteur will expand on and clarify in the report that he will in principle prepare next year on the permissibility of reservations (since the fundamental problem is clearly how to determine whether a belated reservation is impermissible solely owing to that fact). However, two of the consequences in question should be considered at the current stage since they help to clarify the scope of the rule implied by the "chapeau" of article 19 of the 1969 and 1986 Vienna Conventions.[474]

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[470] However, some reservation clauses specify that "reservations to one or more of the provisions of this Convention may be made at any time prior to ratification of or accession to this Convention ..." (Convention of 29 July 1960 on third party liability in the field of nuclear energy) or "at the latest at the moment of ratification or at adhesion, each State may make the reserves contemplated in articles ..." (Hague Convention of 5 October 1961 concerning the protection of infants — these examples are quoted by P. H. Imbert, *Les réserves aux traités multilatéraux*, Paris, Pedone, 1979, pp. 163-164).

[471] It has been stated particularly forcefully by Giorgio Gaja: "the latest moment in which a State may make a reservation is when it expresses its consent to be bound by a treaty" ("Unruly Treaty Reservations", in *Le droit international à l'heure de sa codification — Études en l'honneur de Roberto Ago*, Milan, Giuffrè, 1987, vol. I, p. 310).

[472] Moreover, this explains why States sometimes try to get around the prohibition on formulating reservations after the entry into effect of a treaty by calling unilateral statements "interpretative declarations", which actually match the definition of reservations (see para. 27 of the commentary to draft guideline 1.2 ("Definition of interpretative declarations"), *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), p. 236; see also the third report on reservations to treaties, A/CN. 4/491/Add.4, para. 340.

[473] *I.C.J. Reports 1988*, p. 85.

[474] It would seem unnecessary to reproduce formally in the Guide to Practice the rule enunciated in the provision in question: That would overlap with the definition set out in draft guidelines 1.1 and 1.1.2. However, it is included in order to introduce the exceptions that may be made with respect to it by draft guideline 2.3.1 (see para. 286 below).

281. On the one hand, the principle that a reservation may not be formulated after the expression of definitive consent to be bound appeared to be sufficiently established at the Inter-American Court of Human Rights for the Court to consider, in its advisory opinion of 8 September 1983 concerning *Restrictions to the death penalty*, that once made,[475] a reservation "escapes" from its author and may not be interpreted outside the context of the treaty itself. The Court adds the following:

> "A contrary approach might ultimately lead to the conclusion that the State is the sole arbiter of the extent of its international obligations on all matters to which its reservation related, including even all such matters which the State might subsequently declare that it intended the reservation to cover.
>
> "The latter result cannot be squared with the Vienna Convention, which provides that a reservation can be made only when signing, ratifying, accepting, or acceding to a treaty (Vienna Convention, art. 19)".[476]

282. On the other hand, following the *Belilos* case,[477] the Swiss Government initially revised its 1974 "interpretative declaration", which the Strasbourg Court regarded as an impermissible reservation, by adding a number of clarifications to its new "declaration".[478] The permissibility of this new declaration, which was criticized by the relevant doctrine,[479] was challenged before the Federal Court, which in its decision *Elisabeth B. v. Council of State of Thurgau Canton* of 17 December 1992 declared the declaration invalid on the ground that it was a new reservation[480] that was incompatible with paragraph (1) of article 64 of the European Convention on Human Rights.[481] *Mutatis mutandis*, the limit on the formulation of reservations imposed by article 64 of the Rome Convention is similar to the limit resulting from article 19 of the Vienna Conventions, and the judgement

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[475] The word "made" is probably more appropriate here than "formulated", since the Inter-American Court of Human Rights considers (perhaps questionably) that "a reservation becomes an integral part of the treaty", which is conceivable only if it is "in effect".

[476] Advisory opinion OC-3/83, paras. 63-64. Giorgio Gaja interprets this advisory opinion the same way ("Unruly Treaty Reservations", in *Le droit international à l'heure de sa codification — Études en l'honneur de Roberto Ago*, Milan, Giuffrè, 1987 vol. I, p. 310).

[477] Judgement of 29 April 1988, Series A, No. 132.

[478] See Council of Europe, European Court of Human Rights, *Reservations and declarations*, European Treaty Series (ETS), No. 5.

[479] See in particular G. Cohen-Jonathan, "Les réserves à la Convention européene des droits de l'homme", Revue générale de droit international public 1989, p. 314. Also see the other references made by J.-F. Flauss, "Le contentieux de la validité des réserves à la CEDH [Cour européenne des droits de l'homme] devant le Tribunal fédéral suisse: Requiem pour la déclaration interprétative relative à l'article 6, paragraphe, 1, Revue universelle des droits de l'homme 1993, note 28, p. 300.

[480] The European Court of Human Rights would have declared the 1974 "declaration" as a whole invalid: "the interpretative declaration concerning article 6, paragraph 1, European Court of Human Rights, formulated by the Federal Council at the time of ratification could therefore not have a full effect in either the field of criminal law or in that of civil law. As a result, the 1988 interpretative declaration cannot be regarded as a restriction, a new formulation or a clarification of the reservation that existed previously. Rather, it represents a reservation formulated subsequently" (*Journal des Tribunaux*, 1995, p. 536; German text in *EuGRZ* 1993, p. 72).

[481] "Any State may, when signing this Convention or when depositing an instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article."

of the Swiss Federal Court should certainly be regarded as a reaffirmation of the prohibition in principle on reservations formulated following the definitive expression of consent to be bound and also, perhaps, of the impossibility of formulating a new reservation in the guise of an interpretation of an existing reservation.[482]

283. The decision of the European Commission on Human Rights in the *Chrysostomos et al.* case leads to the same conclusion but provides an additional lesson. In the case in question, the Commission believed that it followed from the clear wording of article 64, paragraph 1, of the European Convention on Human Rights that a High Contracting Party may not, in subsequent recognition of the individual right of appeal, make a major change in its obligations arising from the Convention for the purposes of procedures under article 25.[483] Here again, the decision of the European Commission may be interpreted as a confirmation of the rule resulting from the introductory wording of the provision in question, with the important clarification that a State may not circumvent the prohibition on reservations following ratification by adding to a declaration made under an opting-in clause (which, does not in itself, constitute a reservation)[484] conditions or limitations with effects identical to those of a reservation, at least in cases where the optional clause in question does not make any corresponding provision.

284. Although in the *Loizidou* judgement of 23 March 1995 rendered in the same case the Court was not as precise, the following passage can be regarded as a reaffirmation of the position in question:

> "The Court further notes that article 64 of the Convention enables States to enter reservations when signing the Convention or when depositing their instruments of ratification. The power to make reservations under article 64 is, however, a limited one, being confined to particular provisions of the Convention ..."[485]

285. The decisions of the Inter-American Court of Human Rights, the European Court of Human Rights and the Swiss Federal Court reaffirm the stringency of the rule set out at the beginning of article 19 of the Vienna Conventions on the law of treaties and draws very direct and specific consequences therefrom, which certainly should be made explicit in the Guide to Practice.

286. This draft guideline could be worded as follows:

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[482] For a discussion of the other problems posed by this judgement, see section B, para. 2, below.

[483] Decision of 4 March 1991, Revue universelle des droits de l'homme, 1991, p. 200, para. 15.

[484] See paras. 179-196 above and draft guidelines 1.4.6 and 1.4.7.

[485] Publications of the European Court of Human Rights, Series A, vol. 310, p. 28, para. 76.

2.3.4 *Late exclusion or modification of the legal effects of a treaty by procedures other than reservations*

Unless otherwise provided in the treaty, a contracting party to a treaty may not exclude or modify the legal effect of provisions of the treaty by:

(a) Interpretation of a reservation made earlier; or

(b) A unilateral statement made under an optional clause.

287. The Special Rapporteur is aware that, in the draft guideline proposed above, he has reverted to certain "alternatives" to reservations, which, he proposed, in the previous chapter, should be excluded from the scope of the Guide to Practice. He believes, however, that such a guideline is essential once it is a matter not of regulating these procedures as such, but of emphasizing that they may not be used to circumvent the rules relating to reservations themselves. By contrast, since draft guideline 1.4.6[486] defines unilateral statements made under an optional clause and is to be the subject of a commentary, it does not appear necessary to expand further here on the meaning of the rule reflected in subparagraph (a); it will be quite sufficient to refer back to draft guideline 1.4.6 and the related commentary.

288. Despite its far-reaching implications, the principle that a reservation may not be formulated after expression of consent to be bound "is not absolute. It applies only if the contracting States do not authorize by agreement the formulation, in one form or another, of new reservations".[487]

289. Although this hypothesis "has never been contemplated, either in the context of the International Law Commission or during the Vienna Conference",[488] it is relatively frequent.[489] Thus, for example:

- Article 29 of the Convention of 23 July 1912 on the unification of the law relating to bills of exchange provided that:

> "The State which desires to avail itself of the reservations in Article 1, paragraph 2, or in Article 22, paragraph 1, must specify the reservation in its instrument of ratification or adhesion ...
>
> "The contracting State which *hereafter* desires to avail itself of the reservations[490] above mentioned, must notify its intention in writing to the Government of the Netherlands ...";[491]

[486] See para. 189 above.

[487] Jean-François Flauss, "Le contentieux de la validité des réserves à la CEDH devant le Tribunal fédéral suisse: Requiem pour la déclaration interprétative relative à l'article 6, paragraphe 1", *Revue universelle des droits de l'homme*, vol. 5, 1993, p. 302.

[488] P. H. Imbert, *Les réserves aux traités multilatéraux*, Paris, Pedone, 1979, p. 12, note 14.

[489] In addition to the examples cited below, see those given by P. H. Imbert in *Les réserves aux traités multilatéraux*, Paris, Pedone, 1979, pp. 164-165.

[490] In fact, what is meant here is not *reservations*, but *reservation clauses*.

[491] See also article 1, paragraphs 3 and 4, of the Convention of 7 June 1930 providing a uniform law for bills of exchange and promissory notes and article 1, paragraphs 3 and 4, of the Convention of 19 March 1931 providing a uniform law for cheques: "... the reservations referred to in Articles ... may, however, be made after ratification or accession, provided that they are notified to the Secretary-General of the League of Nations ...".

– Likewise, under article XXVI of the Warsaw Convention of 12 October 1929 as amended by the 1944 Chicago Protocol and the 1955 Hague Protocol:

"No reservation may be made to this Protocol except that a State may *at any time* declare by a notification addressed to the Government of the People's Republic of Poland that the Convention as amended by this Protocol shall not apply to the carriage of persons, cargo and baggage for its military authorities on aircraft, registered in that State, the whole capacity of which has been reserved by or on behalf of such authorities";

– Article 38 of the Hague Convention of 2 October 1973 concerning the international administration of the estates of deceased persons provides that:

"A Contracting State desiring to exercise one or more of the options envisaged in Article 4, the second paragraph of Article 6, the second and third paragraphs of Article 30 and Article 31, shall notify this to the Ministry of Foreign Affairs of the Netherlands, either at the time of the deposit of its instrument of ratification, acceptance, approval or accession *or subsequently*";[492]

– Under article 30, paragraph 3, of the Convention of 25 January 1988 on Mutual Administrative Assistance on Tax Matters (Council of Europe):

"*After the entry into force of the Convention in respect of a Party*, that Party may make one or more of the reservations listed in paragraph 1 *which it did not make at the time of ratification, acceptance or approval*. Such reservations shall enter into force on the first day of the month following the expiration of a period of three months after the date of receipt of the reservation by one of the Depositaries";[493]

– Similarly also, article 10, paragraph 1, of the International Convention on arrest of ships of 12 March 1999 provides that:

"Any State may, at the time of signature, ratification, acceptance, or accession, *or at any time thereafter*, reserve the right to exclude the application of this Convention to any or all of the following: ...".

290. This is not especially problematic in itself and is in conformity with the idea that the Vienna rules are only of a supplementary nature (as will be the guidelines of the Guide to Practice, and with all the more reason).[494] However, since what is

"Each of the High Contracting Parties may, in urgent cases, make use of the reservations contained in Articles ... even after ratification or accession ...".

[492] See also article 26 of the Hague Convention of 14 March 1978 on the law applicable to matrimonial property regimes: "A Contracting State having at the date of the entry into force of the Convention for that State a complex system of national allegiance may specify *from time to time* by declaration how a reference to its national law shall be construed for the purposes of the Convention". This hypothesis may refer to an interpretative statement rather than a reservation.

[493] This Convention entered into force on 1 April 1995; it seems that no State party has exercised the option envisaged in this provision. See also article 5 of the 1978 Additional Protocol to the European Convention on information on foreign law, "[a]ny Contracting Party which is bound by the provisions of both Chapters I and II may at any time declare by means of a notification addressed to the Secretary General of the Council of Europe that it will only be bound by one or the other of Chapters I and II. Such notification shall take effect six months after the date of the receipt of such notification".

[494] See para. 233 and note 287 above.

involved is a derogation from a rule now accepted as customary and enshrined in the Vienna Conventions, it seems necessary that such a derogation should be expressly provided for in the treaty.

291. It is true that the European Commission on Human Rights, curiously,[495] is more flexible in this respect, having appeared to rule that a State party to the Rome Convention could invoke the amendment of national legislation covered by an earlier reservation to modify, at the same time, the scope of that reservation without violating the time limit placed on the option of formulating reservations by article 64 of the Convention.[496] The import of this jurisprudence[497] is not clear, however, and it may be that the Commission took this position because, in reality, the amendment of its legislation did not in fact result in an additional limitation on the obligations of the State concerned.[498]

292. Whatever the case, the requirement that there should be a clause expressly authorizing the formulation of a reservation after expression of consent to be bound seems all the more crucial given that it was necessary, for particularly pressing practical reasons, which the Commission set out in its commentary to draft guideline 1.1.2, to include a time limit in the definition of reservations itself:

> "The idea of including time limits on the possibility of making reservations in the definition of reservations itself has progressively gained ground, given the magnitude of the drawbacks in terms of stability of legal relations of a system which would allow parties to formulate a reservation at any moment. It is in fact the principle *pacta sunt servanda* itself which would be called into question, in that at any moment a party to a treaty could, by formulating a reservation, call its treaty obligations into question; in addition, this would excessively complicate the task of the depositary."[499]

293. Thus, there is undoubtedly a need to specify this requirement in a draft guideline. However, since this is not the only exception to the rule that a reservation must, in principle, be made not later than the moment at which consent to be bound is expressed, it is doubtless preferable to include the two exceptions in a single draft guideline. It is not clear, moreover, that they are as different from one another as they appear.

294. It emerges from current practice that the other Contracting Parties may unanimously accept a late reservation, and this consent (which may be tacit) can be seen as a collateral agreement extending *ratione temporis* the option of formulating

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[495] Curiously, because the organs of the European Convention on Human Rights are certainly inclined to have little sympathy for the institution of reservations itself.

[496] See note 472.

[497] See for instance *Association X v. Austria*, application 473/59, Yearbook of the European Convention on Human Rights No. 2, p. 405; *X v. Austria*, application 1731/62, Yearbook of the European Convention on Human Rights No. 7, p. 192; or *X v. Austria*, application 8180/78, DR 20, p. 26.

[498] In case 1731/62, the Commission took the view that "the reservation made by Austria on 3 September 1958 ... covers the law of 5 July 1962, *the result of which was not to enlarge* a posteriori *the field removed from the control of the Commission*", Yearbook of the European Convention on Human Rights No. 7, p. 202 — italics added.

[499] *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), para. (3), pp. 206-207; see also the third report on reservations to treaties, A/CN.4/491/Add.3, para. 136.

reservations — if not reservations to the treaty concerned in general, then at least the reservation or reservations in question.

295. This possibility has been seen as translating the principle that "the parties are the ultimate guardians of a treaty and may be prepared to countenance unusual procedures to deal with particular problems".[500] In any event, according to another author, "[t]he solution must be understood as dictated by pragmatic considerations. A party remains always[501] at liberty to accede anew to the same treaty, this time proposing certain reservations. As the result will remain the same whichever of these two alternative actions one might choose, it seemed simply more expedient to settle for the more rapid procedure ...".[502]

296. Initially, the Secretary-General of the United Nations, in keeping with his great caution in this area, had held to the position that: "[i]n accordance with established international practice to which the Secretary-General conforms in his capacity as depositary, a reservation may be formulated only at the time of signature, ratification or accession", and, as a result, he had taken the view that a party to the Convention on the Elimination of All Forms of Racial Discrimination which did not make any reservations at the time of ratification was not entitled to make any later.[503] Two years later, however, he softened his position considerably in a letter to the permanent mission to the United Nations of a Member State[504] that was contemplating denouncing the Convention of 31 March 1931 providing a uniform law for cheques with a view to re-acceding to it with new reservations. Taking as a basis "the general principle that the parties to an international agreement may, by unanimous decision, amend the provisions of an agreement or take such measures as they deem appropriate with respect to the application or interpretation of that agreement", the Legal Counsel states:

> "Consequently, it would appear that your Government could address to the Secretary-General, over the signature of the Minister for Foreign Affairs, a letter communicating the proposed reservation together with an indication of the date, if any, on which it is decided that it should take effect. The proposed reservation would be communicated to the States concerned (States parties, Contracting States and signatory States) by the Secretary-General and, in the absence of any objection by States parties within 90 days from the date of that communication (the period traditionally set, according to the practice of the Secretary-General, for the purpose of tacit acceptance and corresponding, in the present case, to the period specified in the third paragraph of article I of the Convention for acceptance of the reservations referred to in articles 9, 22, 27

[500] D. W. Greig, "Reservations: Equity as a balancing factor?", *Australian Yearbook of International Law*, 1995, pp. 28-29.

[501] The author is referring to a specific treaty: the Convention of 19 March 1931 providing a uniform law for cheques (see para. 296 below), in which article VIII expressly provides for the option of denunciation; but the practice also applies in the case of treaties that do not include a withdrawal clause (see para. 298 below).

[502] Frank Horn, *Reservations and interpretative declarations to multilateral treaties*, T. M. C. Asser Institute, Swedish Institute of International Law, Studies in International Law, vol. 5, 1988, p. 43.

[503] Memorandum to the Director of the Division of Human Rights, 5 April 1976, *United Nations Juridical Yearbook* 1976, p. 221.

[504] The Member State in question was France (cf. Frank Horn, *Reservations and interpretative declarations to multilateral treaties*, T. M. C. Asser Institute, Swedish Institute of International Law, Studies in International Law, vol. 5, 1988, p. 42).

and 30 of annex II), the reservation would be considered to take effect on the date indicated".[505]

297. This is indeed what happened: the French Government addressed to the Secretary-General, on 7 February 1979, a letter drafted in accordance with this information; the Secretary-General circulated this letter on 10 February and "[s]ince no objections by the Contracting States were received within 90 days from the date of circulation of this communication ... the reservation was deemed accepted and took effect on 11 May 1979"; curiously, the Government of the Federal Republic of Germany expressly stated, on 20 February 1980, that it "raise[d] no objections thereto".[506]

298. Since then, the Secretary-General of the United Nations appears to have adhered continuously to this practice in the performance of his functions as depositary.[507] It was formalized in a legal opinion of the Secretariat of 19 June 1984 to the effect that "the parties to a treaty may always decide, *unanimously*, at any time, to accept a reservation in the absence of, or even contrary to, specific provisions in the treaty", and irrespective of whether the treaty contains express provisions as to when reservations may be formulated.[508]

299. This practice is not limited to the treaties of which the Secretary-General is the depositary. In the above-mentioned 1978 legal opinion, the Legal Counsel of the United Nations had referred to a precedent involving a late reservation to the Customs Convention of 6 October 1960 on the Temporary Importation of Packings deposited with the Secretary-General of the Customs Cooperation Council, article 20 of which "provides that any Contracting Party may, at the time of signing and ratifying the Convention, declare that it does not consider itself bound by article 2 of the Convention. Switzerland, which had ratified the Convention on 30 April 1963, made a reservation on 21 December 1965, which was submitted by the depositary to the States concerned and, in the absence of any objection, was considered accepted with retroactive effect to 31 July 1963".[509]

300. Several States parties to the 1978 Protocol to the International Convention of 1973 for the Prevention of Pollution from Ships (MARPOL), which entered into

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[505] Letter dated 14 September 1978, *United Nations Juridical Yearbook* 1978, pp. 199-200.

[506] *Multilateral treaties deposited with the Secretary-General* ..., vol. II, p. 422, note 4.

[507] In addition to the examples given by Giorgio Gaja, "Unruly Treaty Reservations", in *Le droit international à l'heure de sa codification — Études en l'honneur de Roberto Ago*, Milan, Giuffrè, 1987, vol. I, p. 311, see for instance Belgium's reservation (which in fact amounts to a general objection to the reservations formulated by other parties) to the 1969 Convention on the Law of Treaties: while this country had acceded to the Convention on 1 September 1992, "[o]n 18 February 1993, the Government of Belgium notified the Secretary-General that its instrument of accession should have specified that the said accession was made subject to the said reservation. None of the Contracting Parties to the Agreement having notified the Secretary-General of an objection either to the deposit itself or to the procedure envisaged, within a period of 90 days from the date of its circulation (23 March 1993), the reservation is deemed to have been accepted" (*Multilateral treaties deposited with the Secretary-General* ..., vol. II, p. 275, note 9).

[508] Letter to a governmental official in a Member State, *United Nations Juridical Yearbook* 1984, p. 183; the italics are contained in the original text.

[509] Letter to the Permanent Mission of a Member State to the United Nations, 14 September 1978, *United Nations Juridical Yearbook* 1978, pp. 199-200.

force on 2 October 1983, have widened the scope of their earlier reservations[510] or added new ones after expressing their consent to be bound.[511]

301. Likewise, late reservations to certain conventions of the Council of Europe have been formulated without any objection being raised. This was true, for example, of:

- Greece's reservation to the European Convention on the Suppression of Terrorism of 27 January 1977;[512]
- Portugal's reservations to the European Convention of 20 April 1959 on Mutual Assistance in Criminal Matters;[513] and
- The "declaration" by the Netherlands of 14 October 1987 restricting the scope of its ratification (on 14 February 1969) of the European Convention on Extradition of 13 December 1957.[514] [515]

302. This brief (and incomplete) picture proves one point: it is not out of the question that late reservations should be deemed to have been legitimately made, in the absence of any objection by the other contracting Parties consulted by the depositary.[516] But it also shows that the cases involved have almost always been fairly borderline ones, either the delay in communicating the reservation was minimal, or the notification occurred after ratification but before the entry into force of the treaty for the reserving State,[517] or else the planned reservation was duly

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[510] France (ratification — 25 September 1981; amendment — 11 August 1982 — IMO, *Status of Multilateral Conventions and Instruments in Respect of Which the International Maritime Organization or its Secretary-General Performs Depositary or Other Functions as at 31 December 1999*, p. 77).

[511] Liberia (ratification — 28 October 1980, new reservations — 27 July 1983, subject of a procès-verbal of rectification of 31 August 1983), ibid., p. 81; Romania (accession — 8 March 1993, rectified subsequently, in the absence of any objection, to include reservations adopted by Parliament), ibid., p. 83; United States of America (ratification — 12 August 1980, reservations communicated — 27 July 1983, subject of a procès-verbal of rectification of 31 August 1983), ibid., p. 86; in the case of Liberia and the United States, the French Government stated that, in view of their nature, it had no objection to those rectifications, but such a decision could not constitute a precedent.

[512] Ratification — 4 August 1988; rectification communicated to the Secretary-General — 5 September 1988. Greece invoked an error: the reservation expressly formulated in the act authorizing ratification had not been transmitted at the time of the deposit of the instrument of ratification; Internet site: http://conventions.coe.int/treaty/EN/cadreprincipal.htm.

[513] Deposit of the instrument of ratification — 27 September 1994; entry into force of the Convention for Portugal — 26 December 1994; notification of reservations and declarations — 19 December 1996; in this case too, Portugal invoked an error due to the non-transmission of the reservations contained in the Assembly resolution and the Decree of the President of the Republic published in the Official Gazette of the Portuguese Republic (Internet site: http://conventions.coe.int/treaty/EN/cadreprincipal.htm).

[514] Internet site: http://conventions.coe.int/treaty/EN/cadreprincipal.htm.

[515] See also the example of the late reservations of Belgium and Denmark to the European Agreement on the Protection of Television Broadcasts cited by Giorgio Gaja ("Unruly Treaty Reservations", in *Le droit international à l'heure de sa codification — Études en l'honneur de Roberto Ago*, Milan, Giuffrè, 1987, vol. I, p. 311).

[516] Regarding the exact modalities for such consultation and the parties consulted, see sect. 2 below.

[517] In this connection Giorgio Gaja cites two reservations added on 26 October 1976 by the Federal Republic of Germany to its instrument of ratification (dated 2 August 1976) of the Convention of 1954 relating to the Status of Stateless Persons (cf. *Multilateral treaties deposited with the Secretary-General* ..., vol. I, p. 279, note 4) and observes that the Secretary-General's position

published in the official publications, but was "forgotten" at the time of the deposit of the instrument of notification, which can, at a pinch, be considered "rectification of a material error".

303. In a pamphlet published by the Council of Europe, Mr. Jörg Polakiewicz, Deputy Head of the organization's Legal Advice Department and Head of the Treaty Office, emphasizes the exceptional nature of the derogations permitted within that organization from the agreed rules on formulating reservations and adds: "Accepting the belated formulation of reservations may create a dangerous precedent which could be invoked by other States in order to formulate new reservations or to widen the scope of existing ones. Such practice would jeopardize legal certainty and impair the uniform implementation of European treaties".[518] For the same reasons, some authors are reluctant to acknowledge the existence of such a derogation from the principle of the limitation *ratione temporis* of the possibility of formulating reservations.[519]

304. Yet, it is a fact that "[a]ll the instances of practice here recalled point to the existence of a rule that allows States to make reservations even after they have expressed their consent to be bound by a treaty, provided that [the] other Contracting States acquiesce to the making of reservations at that stage".[520] In fact, it is difficult to imagine what might prevent all the contracting States from agreeing to such a derogation, whether this agreement is seen as an amendment to the treaty or as the mark of the "collectivization" of control over the permissibility of reservations.[521]

305. It is this requirement for unanimity, be it passive or tacit, that makes the exception to the principle acceptable and limits the risk of abuse. It is an indissociable element of this derogation, observable in current practice and consistent with the role of "guardian" of the treaty that States parties may collectively assume.[522] But this requirement is not meaningful, nor does it fulfil its objectives, unless a single objection renders the reservation impossible. Failing this, the very principle established in the first phrase of article 19 of the Vienna Conventions of 1969 and 1986 would be reduced to nothing: any State could add a new reservation to its acceptance of a treaty at any time because there would always be one other contracting State that would not object to such a reservation, and the situation would revert to that in which States or international organizations find

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that, in the absence of any objection, the reservations could be deemed to have been made on the date of ratification was "questionable, as the instrument of ratification could not be withdrawn" (Giorgio Gaja, "Unruly Treaty Reservations", in *Le droit international à l'heure de sa codification — Études en l'honneur de Roberto Ago*, Milan, Giuffrè, 1987, vol. I, p. 311). Obviously, this is correct, but the "departure" from the rule contained in the chapeau of article 19 of the Vienna Conventions is limited for all that.

[518] *Treaty making in the Council of Europe*, Strasbourg, 1999, p. 94.

[519] Cf. R. W. Edwards, Jr., "Reservations to treaties", *Michigan Journal of International Law* 1989, p. 383, or R. Baratta, *Gli effecti delle riserve ai trattati*, Milan, Giuffrè, 1999, p. 27, note 65.

[520] Giorgio Gaja, "Unruly Treaty Reservations", in *Le droit international à l'heure de sa codification — Études en l'honneur de Roberto Ago*, Milan, Giuffrè, 1987, vol. I, p. 312.

[521] This "control" must, of course, be exercised in conjunction with the "organs of control", where they exist. In the *Chrysostomos* and *Loizidou* cases, control by States over the permissibility *ratione temporis* of reservations (introduced by Turkey by means of an optional statement accepting individual petitions) was superseded by the organs of the European Convention on Human Rights (see paras. 283-284 above).

[522] See para. 295 above.

themselves at the time of becoming parties, when they enjoy very broad scope for formulating reservations, subject only to the limits set in articles 19 and 20.

306. It does not then seem compatible with the spirit of either the "Vienna definition" or the principle set forth in article 19 to consider that "an objection on the part of a Contracting State would arguably concern only the effects of the late reservations in the relations between the reserving and the objecting States".[523] The caution demonstrated in practice and the clarifications provided on several occasions by the Secretary-General, together with doctrinal considerations and concerns relating to the maintenance of legal certainty, justify, in this particular instance, the strict application of the rule of unanimity — it being understood that, contrary to the traditional rules applicable to all reservations (except in Latin America), this unanimity concerns the acceptance of (or at least the absence of any objection to) late reservations. It is without effect, however, on the participation of the reserving State (or international organization) in the treaty itself: in the event of an objection, it remains bound, in accordance with the initial expression of its consent; and it can only opt out (with a view to reacceding subsequently and formulating anew the rejected reservations) in conformity with either the provisions of the treaty itself or the general rules codified in articles 54 to 64 of the Vienna Conventions.

[Continued in document A/CN.4/508/Add.4]

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[523] Giorgio Gaja, "Unruly Treaty Reservations", in *Le droit international à l'heure de sa codification — Études en l'honneur de Roberto Ago*, Milan, Giuffrè, 1987, vol. I, p. 312.